

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA MCCANDLISS,

Plaintiff-Appellant,

v

TRAVELERS LIFE INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 197905

Oakland Circuit Court

LC No. 95-500386-CK

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff claims on appeal that the trial court improperly shifted the burden of proof to plaintiff and erred in finding that no question of fact existed regarding the termination of an insurance policy prior to the death of the insured. We affirm.

On February 26, 1964, defendant issued a whole life insurance policy on behalf of plaintiff's husband at the time, Donald McCandliss. The insurance policy provided for death benefits of \$40,000 and required a quarterly premium of \$214.40. In October 1984, Donald McCandliss and plaintiff were divorced. Pursuant to the final judgment of divorce, plaintiff became the irrevocable beneficiary to all life insurance of Donald McCandliss. Donald McCandliss died on February 15, 1989. When plaintiff discovered the life insurance policy on May 18, 1995, she made a claim on defendant for payment of the death benefits. When plaintiff did not receive payment, she filed a complaint for breach of contract. Defendant filed a motion for summary disposition, arguing that the insurance policy had terminated prior to Donald McCandliss' death. The trial court agreed and granted defendant's motion.

On appeal, plaintiff argues that the trial court improperly granted defendant's motion for summary disposition because it shifted the burden of proof on plaintiff to come forward with evidence to refute an unsupported contention of defendant and because genuine issues of material fact existed. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

This Court reviews de novo the grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(10). *McGuirk Sand & Gravel, Inc v Meridian Mutual Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *GP Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 561; 509 NW2d 780 (1993). A court must consider the documentary evidence available to it, including the pleadings, depositions, admissions and affidavits, in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Id.*

The moving party has the initial burden of identifying the matters that have no factual disputes and of supporting its position with documentary evidence. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). The party opposing the motion has the burden to use documentary evidence to show the existence of a genuine issue of material fact. *Id.* Speculation and conjecture are insufficient to show that a genuine issue of material fact exists. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). The existence of a disputed fact must be established by admissible evidence. *Cox v City of Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). MCR 2.116(C)(10) permits summary disposition when the court determines that no record might be developed that will leave open an issue upon which reasonable minds could differ. *Id.* at 397-398.

Defendant had the burden of identifying the matters that had no factual disputes and of supporting its position with documentary evidence. Contrary to plaintiff's assertion, we conclude that defendant met its burden. In support of its assertion that the insurance policy had lapsed and terminated prior to the death of the insured, defendant produced the record it kept in the normal course of business, the life status card. The life status card showed that the policy had lapsed and terminated. Defendant also produced the affidavit of its employee, Edwin Erickson, to support its claim. Erickson had been an employee of defendant's since approximately 1963. Part of his job duties while employed with defendant was to analyze and interpret life status cards in order to gain information or answer questions regarding an insurance policy. He averred that the life status cards were used by defendant to record information concerning the basic provisions and status of a life insurance policy. Further, he was familiar with the format and the information recorded on the life status cards, including the significance and meaning of the codes and abbreviations used on the life status cards. He averred that the abbreviations and codes on the life status card for the life insurance purchased by Donald McCandliss on February 26, 1964, provided in relevant part the following information: (1) the policy required a quarterly premium payment of \$214.40; (2) that a payment on the policy was made on April 15, 1970; (3) the billing date for the second quarterly premium was May 26, 1970; (4) the policy lapsed because the quarterly premium was not paid within thirty one days after the billing date of May 26, 1970; and (5) Donald McCandliss borrowed \$3,420 from the cash value of the policy. Erickson averred that the amount of the loan, \$3,420, was the maximum loan amount available for the policy. Therefore, on the date of the lapse, there was no loan residuary available against which premiums could have been paid.

After defendant had identified and supported its claim that the life insurance policy lapsed in 1970, plaintiff had the burden to use documentary evidence to show the existence of a genuine issue of material fact. *Royce, supra* at 541. However, plaintiff did not produce any evidence, but only

speculation, in support of her claim that a genuine issue of material fact existed. Speculation and conjecture are insufficient to show that a genuine issue of material fact existed. *Libralter Plastics, supra* at 486. Plaintiff did not submit any admissible evidence to establish a disputed material fact. The only evidence plaintiff presented was a copy of the insurance policy. However, through the life status card, the affidavit of Erickson and the insurance policy, defendant had refuted the validity of the policy and plaintiff did not present any evidence to show that the policy did not lapse in 1970.

Plaintiff argues that a material issue of genuine fact exists regarding the cash value of the policy. She argues that the insurance policy did not terminate on the date it lapsed because, pursuant to the clear language of the insurance policy, the cash value of the policy would have been used to pay the premiums due until exhausted. The relevant language of the policy is as follows:

Automatic Premium Loan –

* * *

Whenever a sufficient Loan Value is available, and subject to the provisions under the subheading “Cash Loans,” any premium unpaid at the end of the grace period, including premium for additional benefits issued in connection with or made a part of this contract, together with any premium necessary to pay this contract to the end of the then current insurance year, shall be paid by a charge as an automatic loan against this contract if this provision is then in effect. If the available Loan Value is insufficient to pay the amounts referred to in the preceding sentence, this contract shall terminate subject to the non-forfeiture provisions.

* * *

Non-Forfeiture Benefits –

Automatic Benefit – If any premium due remains unpaid at the end of the grace period, the basic contract will, if it has a Cash Surrender Value, automatically continue as Extended Term Insurance, unless the owner has made a written request, received at the Home Office of the Company to the contrary.

Extended Term Insurance – The amount of such insurance will be the amount of insurance under the basic contract, less any indebtedness to the Company on or secured by this contract. If the due date of the unpaid premium was the end of an insurance year, the period of such insurance, measured from such due date, will be whatever the Cash Surrender Value on such due date will provide when applied as a net single premium at the then age nearest birthday of the Insured. If there is no indebtedness to the Company on or secured by this contract, the Extended Term Insurance benefits at the end of each insurance year are as shown in the applicable table on the pages headed TABLES OF VALUES or in an extension of such table. In determining Extended Term Insurance benefits as of any premium due date other than

the end of an insurance year, allowance will be made for elapsed time in the year and for any premium paid for the year. At the expiration of the period of Extended Term Insurance, this contract shall be null and void. [Emphasis added.]

Defendant does not dispute that, pursuant to the language of the policy, the cash value of the policy would have been used to pay the premiums due until exhausted. However, defendant relies on the life status card and Erickson's explanation of the card to establish that the insurance policy had no cash value at the time of the lapse because a loan had been taken out against the full cash value of the policy. As a result, when Donald McCandliss did not make his quarterly payment, because the cash value of the policy was zero as a result of the loan, no money was available to cover the premium. Therefore, defendant contends, the policy, pursuant to its terms, became null and void.

An insurance policy is much the same as another contract; it is an agreement between the parties. The court determines what the agreement was between the parties and effectuates the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566, 567; 489 NW2d 431 (1992). Where the language of an insurance policy is clear and unambiguous, it must be enforced as written. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

Plaintiff does not argue that if the value of the policy was zero, the policy would still be valid. Rather, plaintiff argues that defendant has not produced admissible evidence proving that the value of the policy was zero at the time of the lapse. However, we conclude that the Erickson affidavit was competent, demonstrating that Erickson had personal knowledge regarding the information in the affidavit. Erickson had been an employee of defendant for thirty-three years, and he was an employee of defendant at the time Donald McCandliss took out the life insurance policy and at the time the policy lapsed. Further, he averred that part of his job duties was to interpret the life status cards.

Again, plaintiff produced no admissible evidence to show that the policy had value at the point it lapsed for nonpayment of premiums. Instead, plaintiff speculated that the life status card was inaccurate and argued without basis that Erickson was not qualified to interpret the life insurance card. This argument was insufficient to create a genuine issue of material fact. We conclude that the trial court properly granted summary disposition to defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer